No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT C. JOHNSON, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

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OPINIONS BELOW

The findings of fact and conclusions of law (R. 41–46) of the District Court of the Southern District of California, Central Division, are not reported. The oral remarks of the District Court appear in the record at pp. 289–302. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 315–329) is reported at 160 F. 2d 789.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 24, 1947 (R. 330). The petition for writ of certiorari was filed on June 18, 1947, and was granted on October 13, 1947 (R. 332). The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that petitioner had failed to establish a prima facie case in support of his allegation that his injury was caused by the negligence of a fellow seaman.

2. Whether both the trial court and the court below erred in holding that petitioner was not entitled to recover the maintenance and cure here involved.

STATUTES INVOLVED

The Jones Act, Act of March 4, 1915, Sec. 20, 38 Stat. 1185, as amended by Sec. 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007, 46 U. S. C. 688, provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

The Federal Employers' Liability Act, Act of April 22, 1908, Sec. 1, 35 Stat. 65, as amended by the Act of August 11, 1939, 53 Stat. 1404, 45 U. S. C. 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *

STATEMENT

This suit was instituted by a libel filed by petitioner on November 13, 1945, in the United States District Court for the Southern District of California, Central Division (R. 1–8). Petitioner alleged that, while employed as a seaman on the S. S. *Mission Soledad,* he was struck on the head and injured by a block which was "* * * negligently and carelessly dropped by a fellow seaman * * *" (R. 5). He sought damages under the Jones Act, *supra,* as well as compensation for loss of wages, and maintenance and cure (R. 9). The Government answered (R. 9–15), alleging, *inter alia,* that it was ignorant of the cause of the injury and demanded proof thereof (R. 12). A pretrial stipulation was entered into (R. 35–40), and the case was tried

before Judge Hollzer (R. 58). Judge Hollzer, however, died after submission of the case on oral argument and briefs but before decision (R. 49), and by stipulation of the parties, the case was submitted on a transcript of the record to Judge Cavanah (R. 49). The material portions of the record may be briefly summarized as follows:

1. *The pre-trial stipulation.* The pre-trial stipulation states that petitioner, on March 25, 1944, at Los Angeles, signed on the S. S. *Mission Soledad,* a steam tanker owned and operated by the United States, as an able-bodied seaman for a voyage not to exceed twelve months (R. 35–36); and that, on June 30, 1944, while the vessel was at Pearl Harbor, T. H., petitioner, performing duties aboard the ship sustained an injury "* * * when a block, which was being removed by a man working above libelant, fell, striking libelant on the back of the head." (R. 36). The stipulation next recites that petitioner "* * * alleges that this accident was due to the negligence of the ship and respondent denies that such injuries were caused by any negligence of the respondent. * * *" (R. 36). The remainder of the body of the stipulation is concerned with details and exhibits with regard to the nature and extent of petitioner's injuries, as well as the basis for the calculation of wages and bonus (R. 36–39). The statement of "Issues" for

trial contained in the stipulation includes the issue whether "* * * the accident was due to negligence of the respondent. * * *" (R. 39).

2. *Testimony.* Petitioner's testimony, the only testimony offered in support of his allegation that his injury was caused by the negligence of a fellow seaman, showed the following: On June 30, 1944, the *Mission Soledad* was at Pearl Harbor making ready to go to sea (R. 61). The port side forward boom had been swung in and forward and was nested in a cradle located on the port side of the forward gun tube (R. 62, 90). When in use over the side of the ship, this cargo boom was steadied and manipulated by fore and aft guy lines (R. 62). The guy line involved in this case, the aft guy line, consisted of a 30-foot wire pennant and a 4-part tackle made up of two blocks with two "double sheave" lines or falls, between them (R. 62). One end of the pennant was attached to the outer end of the boom, and the other end was attached to the upper, or forward, block (R. 62). While the cargo boom was in use, the lower block of the tackle was shackled to a pad eye located on the well deck of the tanker just aft of the port foremast shroud (R. 62, 101). When the ship is being secured for sea, as here, the guy line is "unbent" or detached from the cradled boom; and to accomplish this, it is first necessary to round in the tackle until the two blocks are "two-blocked". It was this "two-

blocking" operation which was being performed by petitioner, together with a fellow seaman named Dudder, at the time of the injury here involved. The lower block had been unshackled from the well deck pad eye and passed up to the meccano deck, a superficial structure consisting of a series of stanchions and beams built above the main or well deck in order to carry deck cargo (R. 100–102). Here the lower block was carried aft to the full span of the falls and the lines straightened out so that they would run free (R. 102). In petitioner's words "It [the lower block] was lifted up there and brought around, and straightened out in line with the tip of the boom, so in taking in all the slack there would be no lines to foul up the guy line we were taking in. It would run free." (R. 101.) Dudder was on the meccano deck holding the lower block and keeping the falls taut to prevent fouling (R. 101–102, 108). Petitioner was on the well deck hauling in and coiling the hauling end of the tackle (R. 102, 105). The line which petitioner was rounding in ran from him through the upper block, then through the lower block, through the upper block again, and back to the lower block where it was made fast (R. 106). As petitioner rounded in the line thus reducing the span of the falls, Dudder moved forward carrying the unshackled lower block, his rate of movement being controlled by the rate at which petitioner

hauled in and coiled down the line (R. 102, 107).[1] Petitioner testified that he was on the well deck forward of the third 'thwartship beam[2] (R. 110), and that the last time he noticed Dudder the latter was walking on a longitudinal beam on the meccano deck, approximately six feet aft of the third 'thwartship beam (R. 103). Petitioner's last recollection of the rounding in operation was his bending over and coiling down line (R. 110). The lower block carried by Dudder fell and,

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[1] On an important issue of fact in this case, petitioner makes a serious misstatement. The petitioner states (Pet. 3) that he was assisting Dudder, referring to pages 264, 210, and 102 of the record. None of these record references give any support to the statement thus made. On the contrary, pages 102 and 107 of the record indicate quite clearly that petitioner was in control of the rounding-in operation. Petitioner similarly creates an impression opposite to that supported by the record when he states that he was "taking in the slack" (Pet. 3). As we show above, petitioner was hauling and coiling, Dudder's rate of movement forward being controlled by petitioner's hauling on the free end of the line (R. 102–107).

[2] It is not clear from the record where petitioner was standing at the time of the accident. He stated that he was standing "just aft" of the third 'thwartship beam between the niggerhead of the winch and the port outboard stanchion (R. 105). The niggerhead of the winch, however, is forward of the third 'thwartship beam (Petitioner's Exhibits 1, 8). Moreover, when asked to indicate his position on photographs of an allegedly similar deck lay-out (R. 63–65) he marked a spot which was forward of the third 'thwartship beam (R. 105, Petitioner's Exhibits 1, 8). He subsequently stated that he was standing forward of the niggerhead, four feet forward of the third 'thwartship beam (R. 110). The 'thwartship beams are approximately 12 feet apart (R. 103).

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swinging like a pendulum on the lines between it and the upper block with the third 'thwartship beam acting as a fulcrum, struck petitioner on the back of the head[3] (R. 299; Pet. 4).

Petitioner's testimony, in support of his allegation of negligence on the part of a fellow seaman, consisted of a few questions and answers which, for the convenience of the Court, are here set out verbatim:

> [R. 107] Q. But as you pulled in the rope, it would pull the after block forward?—A. Yes.
>
> Q. And did Mr. Dudder carry that block in his hand?—A. Yes, he did.
>
> Q. And as you pulled in the rope, he would walk forward with the block?—A. Yes.
>
> Q. Now, were you able to take in that rope freely at all times before the accident?—A. Yes.
>
> Q. And did Mr. Dudder pull on the block so it would jerk your rope or pull the rope that you were coiling?—A. No.
>
> Q. And from the position you have indicated here at "Q-1," were the ropes laying

[3] At the trial petitioner indicated that, during the rounding-in operation, the upper or forward block lay approximately on the first 'thwartship beam (R. 109, Petitioner's Exhibit 8); and approximately 30 feet aft of the end of the cradled boom (R. 109). He stated that the last time he saw Dudder, the latter was on a longitudinal beam approximately 6 feet aft of the third 'thwartship beam (R. 103–104, Petitioner's Exhibit 8). As we have indicated, petitioner, at the time of the injury, was standing forward of the third 'thwartship beam.

across the Maccano deck at all times prior to the accident?—A. Yes.

* * * * *

[R. 108] Q. Now, if these ropes between the two blocks are not kept in a taut position, would you be able to pull in the rope and pull the blocks together?—A. No.

Q. Why?—A. Unless they were in a comparatively taut position, they would foul on one another and it would be impossible for me to take in the slack.

* * * * *

[R. 108–109] Q. By Mr. FALL. Were these lines between the two blocks ever lifted up in the air any distance at all after you started taking the blocks or bringing them together?—A. No.

Q. Now, before the accident happened, were the ropes lying over this second athwartship beam and the third athwartship beam?—A. Yes.

Q. I am referring, of course, and you are, to the ropes between the blocks?—A. Yes.

* * * * *

[R. 109] Q. Did Mr. Dudder yell to you at any time before you were struck?—A. No.

* * * * *

[R. 110] Q. Now, when you were standing there just before the accident, in the last thing you knew before the accident happened, what were you doing?—A. I was coiling the line on the well deck or the Maccano deck.

Q. Standing up or leaning over?—A. I was bending over.

Q. Then what happened?—A. That is all I remember.

* * * * *

[R. 115] Q. Well, was there any defective equipment that caused this accident?—A. No.

* * * * *

Petitioner was the only witness who testified with regard to the accident. The Government located Dudder and arranged for his deposition to be taken and made the transcript available to the petitioner (R. 316). Petitioner's counsel did not offer this deposition, stating, as noted by the court below, that he was not satisfied with "* * * certain parts of it * * *" and claiming there was no burden on petitioner "* * * to bring in adverse witnesses" (R. 316).[4]

[4] The petition (Pet. 4) states that petitioner's trial counsel "* * * assumed, without objection, that the deposition of Dudder having been taken as a witness for the * * *" Government would be offered by the Government, referring to pages 64 and 124 of the record. We do not see how such an "assumption" could be decisive on a principal issue in any circumstances. Here, the record references show no such assumption. Page 64 shows a statement, at best selfserving, that "* * * your [the Government's] deposition will show the man that dropped the block was walking forward on one of these longitudinal beams * * *." Page 124 shows simply a colloquy in which trial counsel for the Government makes the concession, repeatedly made, that petitioner was struck by a block. This colloquy follows an attempt by petitioner's trial counsel to utilize petitioner for the purpose of testifying to conversations with Dudder (R. 124), the precise question again running only to the fact that petitioner was hit by a block.

The balance of the testimony adduced by petitioner at the trial consisted of medical evidence and exhibits. Petitioner was taken by ambulance to the emergency hospital at Pearl Harbor and, after receiving first aid, was sent back to the ship where he remained overnight (R. 36, 111). On the following day, he was examined by a United States Public Health Service surgeon, and was hospitalized for the next four days at Queen's Hospital, Honolulu (R. 36, 112, 241–242). He was discharged from the hospital on July 5, 1944; the Public Health Service record indicated that there had been marked improvement in petitioner's condition, that he was fit for travel, but that he was not fit for duty (R. 112, 242). Petitioner left Pearl Harbor on July 22, 1944, aboard another vessel; he arrived in San Francisco on July 30, 1944, and proceeded to his parents' home in San Diego (R. 114, 116).[5]

On August 17, 1944, petitioner was examined by United States Public Health Service doctors at Los Angeles and was hospitalized at the Marine Hospital (R. 117, 247). He was discharged from the hospital on August 23, 1944, his certificate of discharge stating that no further hospitalization was necessary (R. 245), and was sent to the

[5] On July 31, 1944, petitioner went to the office of the attorneys for the underwriters of the vessel, where he was paid $247.10, and he signed a release in full (R. 115–116, 33–34). The courts below set aside the release (R. 45–46, 289, 321–326), and there is no question raised in regard thereto.

Pacific Palisades Seamen's Rest Center, Santa Monica, California (R. 117–118). He remained at the Rest Center until October 1, 1944,[6] when, in accordance with its rules limiting stays to a maximum of six weeks, he was discharged with a diagnosis of post concussion syndrome[7] (R. 118, 250). The medical report of the Rest Center indicates that petitioner complained of headaches and other nervous symptoms including a fear that he might become a psychiatric patient (R. 249–250);[8] it stated that he was unfit for sea duty for three months, recommended continued treatment at the U. S. Public Health Service in San Diego, and made a prognosis of his condition as "good" (R. 250). Petitioner testified that he still had the "same old ailments" (R. 118) and, upon returning home, he went to bed for several days (R. 119).

On October 4 and 5, 1944, petitioner was furnished out-patient care by the United States Public Health Service in San Diego (R. 119, 251–252). The doctors there advised further hospitalization and offered to send him to the Marine

[6] There is no question here presented as to wages to the end of the voyage, or maintenance and cure until October 1, 1944, when petitioner was discharged from the rest center.

[7] Syndrome is defined as "the sum of signs of any morbid state." Dorland, *The American Illustrated Medical Dictionary*, 18th Ed. (1938), p. 1389.

[8] The report indicates that this fear was apparently aggravated by visits of petitioner's father, who "in his anxiety was apt to be very critical and expressed the wish to collect greater damages" (R. 250).

Hospital in San Francisco (R. 251, 119–120). Petitioner declined, stating that he "would rather not go" (R. 120). When asked why he refused further hospitalization he stated, "to my reasoning, after being in two hospitals and a rest center, if they couldn't find out what was the matter, why, I couldn't see going back to another hospital. It was just one doctor's opinion against a half dozen or more that I had seen already." (R. 121.) He apparently told the Public Health Service officials in San Diego that he intended taking a trip to Sabinal, Texas, to visit the ranch of relatives, and was told by these officials to visit the United States Public Health Service office in Galveston (R. 119, 122). While in Texas, petitioner stated that he went to the Marine Hospital in Galveston "to get some medicine" (R. 121). On November 30, 1944, officials there advised him to enter the hospital for observation, but he refused to do so (R. 254). He was then advised to enter the nearby Rest Center at Kittiwake, Texas, which he also refused to do (R. 254). He was then given medication and told to return to his former home at Sabinal, Texas, and to live and work on the ranch (R. 254).[9]

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[9] Petitioner's counsel contends that Public Health Service officials acquiesced in petitioner's own diagnosis, namely, that he wanted to get away from "* * * all noise and just rest and enjoy people * * *" (R. 121; Pet. 27). As indicated above, Public Health Service officials continually advised hospitalization, a diagnosis which seems amply supported by the testimony of petitioner's father and brother in

He returned to San Diego in January, 1945 (R. 122).

Petitioner has not worked since October 1, 1944. From that date, he has lived continuously with his parents or with relatives, and his necessary living expenses have been paid by his parents (R. 216–217).

3. *Purser's report.* A purser's accident report was offered by petitioner for identification (R. 210) and is contained in the record (R. 262–264).[10] Paragraph 11 of this report, read into

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the district court (R. 157–163, 164–167). The testimony of petitioner's brother is to the effect that, at the time of petitioner's stay in Texas, he was almost continually in a dangerous condition and required constant guarding; that, when left alone on one occasion for 15 minutes, he wandered off and was only found by a general search by everyone on the ranch; and that, when found, petitioner was "* * * standing on the edge of a bluff overlooking the river" (R. 158–159). The testimony of petitioner's father is to the same effect, with the difference that spells were less frequent but that petitioner at all times exhibited psychiatric symptoms (R. 164–167).

[10] Pursuant to statute and executive order, such an accident report was required by Federal regulations to be made (46 C. F. R. Cum. Supp. 136.103) as the initial step under Marine Investigation Board Rules. 46 C. F. R. Cum. Supp. 136.101–136.110. Prior to August 26, 1942, reports were made to the Marine Investigation Board of the Department of Commerce and were only required in cases of a marine casualty or accident involving loss of life. 46 C. F. R. 136.1–136.14. The wartime rules here applicable covered, as well, marine casualty or accident not involving loss of life. A report of personal accident not involving death, as here, was made on Coast Guard Form N C G 924 (e) in quadruplicate These Marine Investigation Board Rules contain provisions for preliminary investigations, "A" Board hearings, sanc-

the record by petitioner's counsel on cross-examination, states (R. 211):

> Sailors were stowing the forward port side boom and the guy block was caught on a davit, one of the men cast it off and line and block fell striking this sailor on the back of the head, block causing a large cut on this man's scalp. * * *

4. *District Court decision.* In his oral remarks, Judge Cavanah stated: "There is pleaded in this complaint both general and specific negligence[11] and the libelant is asking that the doctrine of *res ipsa loquitur* be applied. The court rules that the evidence shows both and that he can rely on that doctrine also" (R. 295).[12]

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tions, provisions for appeals, etc. An examination of the regulations shows clearly that the initial report is merely required to bring a marine casualty or accident to the attention of the appropriate Coast Guard district. Suspension or revocation proceedings, the ultimate sanction in an "A" Board proceeding, must be preceded by a full hearing instituted by formal charges and specifications, notice to the person accused, the power to summon witnesses, to examine and cross examine them, the right to be represented by counsel, and the right to appeal to the chief District Coast Guard Officer of the district in which the hearing was held.

[11] Judge Cavanah is incorrect in his statement that both general and specific negligence were pleaded. The complaint alleges only specific negligence on the part of a fellow seaman (R. 5).

[12] The district judge further stated (R. 295–296): "As I gather from this case, the libelant was on this boat, curling this rope around, and above him this block fell and hit him that was above him; that there was a man above there that was a fellow servant of the working man. This is negligence. * * *"

The district court found as a fact that the petitioner was "struck upon the head by a large block, which was negligently and carelessly dropped by a fellow seaman * * *" (R. 43) and accordingly held that petitioner was entitled to recover damages for injury resulting from negligence (R. 296, 46). Specifically, petitioner was awarded $8,557.60 as loss of past and prospective wages for approximately two years and four months, at the rate of $3,600 per annum; and $7,500 for pain and suffering (R. 44, 291–294). Petitioner was denied a recovery of maintenance and cure after October 1, 1944, on the ground that petitioner had incurred no expense in connection therewith (R. 45, 290, 297).

5. *Circuit Court of Appeals decision.* After summarizing the case, the court below noted, in view of the fact that the case had been decided in the district court on the written record because of Judge Hollzer's death and the further fact that the appeal was in admiralty, that the "clearly erroneous" rule of review was not applicable (R. 317).[13] On petitioner's Jones Act

[13] In his cross-appeal attacking the district judge's allowance of maintenance and cure after October 1, 1944, petitioner stated that the hearing in the circuit court of appeals was a trial *de novo*, a proposition needing no citation of authority in the Ninth Circuit. Opening Brief of Appellant Johnson, C. C. A. 9, No. 11378, p. 7. Petitioner also described the proceeding in the court below as a "trial *de novo*" in connection with his motion for an order to take proof on maintenance after the date of the district court judgment (R. 310–311). Failure to grant this motion is here assigned

claim, the court below held that there was no evidence to support the district judge's finding of negligence, and that the doctrine of *res ipsa loquitur* was not available in the circumstances of the case as a substitute for proof of negligence (R. 317). The circuit court of appeals recognized that petitioner rested his Jones Act case on the negligence of a fellow-servant (R. 317). Reviewing all the evidence (R. 317–318, 319), the court held that there was nothing to show negligence on the part of Dudder nor proof of any circumstances to justify a finding of negligence against the Government (R. 317, 319–320).[14] The court

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as error (Pet. 19). As to the Government's appeal to the court below, petitioner here contends that the "clearly erroneous" rule applied (Pet. 10, 12–13, 33–34). In his reply brief to the Government's appeal on the issue of negligence to the court below, petitioner stated that an "* * * Admiralty appeal is a trial *de novo*, and the case being tried on a transcript, the ordinary presumptions in favor of the findings of the lower Court do not exist." Reply Brief of Johnson, C. C. A. 9, No. 11378, p. 1. In this reply brief (pp. 2–6), petitioner proceeded to argue the negligence question from the record. It is interesting to note that petitioner's reply brief in the court below employs, as the test of *res ipsa loquitur*, the rule of the *Smith* case (p. 5), the quotation of which by the court below is here urged as serious error. (See fn. 14, *infra*, p. 18.)

[14] In considering petitioner's *res ipsa loquitur* argument, the court below specifically cited and relied on the decisions of this Court in *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452, and *Sweeney* v. *Erving*, 228 U. S. 233. In the introductory portion of its discussion of the *res ipsa loquitur* contention, the court below cited various general definitions of the rule, one of which was taken from *Smith* v. *United*

found that the evidence showed that Dudder was assisting petitioner in the "two-blocking" operation and that, beyond this, the record only showed the occurrence of the accident itself (R. 317, 318). Accordingly, the district court judgment against the Government on the Jones Act claim was reversed (R. 320). On petitioner's cross-appeal, the court below affirmed the district court's denial of maintenance and cure after October 1, 1944 (R. 328–329).

SUMMARY OF ARGUMENT

I

Petitioner's suit for damages under the Jones Act rests exclusively on the charge that he was injured as the result of negligence on the part of a fellow seaman, Dudder. The court below measured the proof adduced by petitioner in support of his charge and held that no negligence had been shown. Petitioner's primary attack on this decision is a contention, supported by a reference to the rule of proof which the law imposes on bailees in possession upon proof of damage to goods, that a presumption of Dudder's negligence was raised by proof of the fact of the accident and that the Government was under a duty to

States, 96 F. 2d 976 (C. C. A. 5). The petitioner uses (Pet. 20) this general reference as the basis for his contention that the court below improperly followed the *Smith* case. As indicated above, a reading of the opinion illustrates that the *Sweeney* and *Jesionowski* cases were followed and applied (R. 318–320).

prove its freedom from negligence. From this, petitioner contends that proof of the accident coupled with an unfavorable inference drawn from the Government's silence required judgment in his favor.

It is well established that recovery under the Jones Act must be based on proven fault. Petitioner is essentially seeking to overturn this rule which is embodied in a host of decisions under the Jones Act and the related provisions of the Federal Employers' Liability Act. We submit that there is no warrant for departure from the established rule herein. Petitioner's case is one charging simple negligence on the part of a fellow-servant and meets none of the underlying policy requirements which ground the establishment of special rules of proof in the law of bailments or in the type of case covered by the *res ipsa loquitur* doctrine.

Tested by the established rule that petitioner carries the burden of proof, an analysis of his testimony, the only testimony offered with regard to the accident here involved, fails to establish negligence on the part of Dudder. This testimony, examined in detail, demonstrates that petitioner and Dudder were engaged together in performing a familiar and simple operation. The operation was under petitioner's control and his testimony establishes no more than this and the fact of the accident. On this testimony, therefore, the court below was fully justified in holding

that no judgment against the Government on account of negligence was justified. In fact, a strong inference is raised by petitioner's testimony that the accident was caused by his own conduct. Petitioner argues from other portions of the record, not so much to prove negligence on the part of Dudder as to rebut the inference which thus arises against him. Petitioner contends that, if the probability that he caused the accident by his own conduct be put at rest by his arguments, the rule of *res ipsa loquitur* should be applied to reach the same result as that for which he argues by analogy to the law of bailments.

We submit that this case contains none of the elements which justify the use of the *res ipsa loquitur* doctrine. Accordingly, we submit that the court below correctly held no negligence on the part of the Government had been proved.

II

Petitioner contends (a) that the court below was bound by the concurrent decisions of two district court judges on the issue of negligence, and (b) that the court below erred in failing to use the "plain and manifest error" rule.

As shown in our statement of facts, Judge Hollzer, before whom this case was tried, died before deciding it. The case was decided by Judge Cavanah on a written transcript of the record. The "two court" rule which petitioner

invokes is said to be met by Judge Cavanah's conclusion that the accident resulted from Rudder's negligence, together with Judge Hollzer's signature to the pre-trial stipulation and his rulings on certain points of evidence in the course of the trial before him. We do not think that this is a situation which justifies any "two court" rule argument.

As to petitioner's contention with regard to the "plain and manifest error" rule, it is well settled that an appellate court in an admiralty case is free to review the whole record and is not bound by the findings of a trial judge who neither saw nor heard the witnesses.

III

It is well settled that a claim for maintenance and cure cannot be successfully made where, as a matter of fact, a seaman has rejected proffered hospitalization. Petitioner not only persisted in his unwillingness to enter the Marine Hospital at San Francisco, but he also refused hospitalization in the Marine Hospital at Galveston. Petitioner contends that this was no such refusal of hospitalization as would discharge respondent from liability, because the Public Health Service doctors "acquiesced" in his plans to go to the Texas ranch for a rest and to receive out-patient treatment from the Public Health Service in Galveston. There is nothing in the record, however, to justify the assumption that the Public

Health Service doctors, who could not compel him to take their advice, accepted petitioner's plan as a satisfactory alternative to the hospital treatment which they advised. Thus the record fully sustains the finding of the court below that petitioner voluntarily rejected hospitalization. Although this finding alone is sufficient to defeat petitioner's claim for maintenance and cure, the same conclusion results from a further finding by both courts below that petitioner had incurred no expense or liability in connection therewith.

ARGUMENT

I

PETITIONER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE IN SUPPORT OF HIS ALLEGATION THAT HE WAS INJURED BY THE NEGLIGENCE OF A FELLOW SERVANT

Petitioner's suit for damages under the Jones Act rests exclusively on the allegation that he was injured as the result of negligence on the part of a fellow seaman (R. 5).[15] The court below measured the proof adduced by petitioner in support of the charge, and held (1) that no specific negligence had been shown and (2) that the circumstances shown would not justify a finding of negligence (R. 317, 319–320). In so holding, the court below necessarily sustained the

[15] At the trial, petitioner expressly stated, in answer to a question by his attorney, that his injury had not been caused by defective equipment (R. 115).

Government's right, as respondent in the trial court, to defend on the ground that petitioner had not proved his case and to introduce no evidence on the issue of negligence (R. 316)."[16]

Petitioner's primary attack on this decision of the court below raises a broad and, we believe, completely novel contention. Referring to the rules of proof and inference stated by this Court in *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104, 111 (Pet. 10, 23), petitioner states that the court below erred in weighing the proof adduced by him in support of his charge of negligence by Dudder (the fellow seaman here involved), and finding it insufficient to warrant judgment, on the ground that the decision cleared the Government of the "* * * duty of explaining Dudder's conduct, of rebutting the presumption of negligence on the part of Dudder" (Pet. 23). In other words, petitioner contends that the liability of a defendant, in a suit under the Jones Act for damages based on negligence of a fellow seaman, is to be determined by the rules of proof applied under the law of bailments. Adopting

[16] Petitioner makes references to a statement in the pre-trial stipulation that he was injured "* * * when a block, which was being removed by a man working above libelant, fell, striking libelant on the back of the head" (R. 36) which appear to suggest that the Government stipulated its negligence in advance of trial (Pet. 21). The next sentence in the stipulation contains a specific denial of negligence by the Government (R. 36), and the statement of "Issues" for trial contained in the stipulation includes the issue whether "* * * the accident was due to negligence of the respondent. * * *" (R. 39).

this theory, proof of the fact of the accident would throw on the defendant in such a suit the duty to come forward and disprove negligence, a duty which the law casts upon bailees in possession.

We think that there is no warrant for the rule thus sought by petitioner. We recognize the solicitude with which this Court protects the rights of merchant seamen. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 91. However, the right here involved is that which Congress has afforded by the Jones Act, *supra,* p. 2, under which an injured seaman may, at his election, maintain an action for damages in which "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employes shall apply * * *." The statute thus makes applicable to seamen the provisions of the Federal Emlpoyers' Liability Act, *supra,* pp. 2–3, which give to railroad employees a right of recovery for injuries resulting from the negligence of their employer, its agents or employees. *DeZon* v. *Amer. President Lines,* 318 U. S. 660, 665. The statute is not a compensation act and does not impose liability without fault; recovery of damages under its provisions must be based on proven fault. *DeZon* v. *Amer. President Lines,* 318 U. S. at 671–2. In meeting the statutory test of "proven fault," a claimant under the Jones Act may be, of course, assisted by inferences justified by the circumstances shown

in his proof. But the rule here sought by petitioner goes far beyond the use of justified inferences from his evidence as an aid to meeting the burden of proof, and would overrule the principle stated in the *DeZon* case and a host of related cases under the Jones Act and the Federal Employers' Liability Act. We do not believe that the instant case presents any proper occasion for departure from the well established rule. Petitioner's case is one charging simple negligence by a fellow servant in which he cannot say that he was without access to the facts of the accident. He thus fails to bring himself within the policy which underlies the rule of bailments upon which he relies.[17] *Commercial Corp.* v. *N. Y. Barge*

[17] As noted by the court below, the Government located Dudder, whose negligence was put at issue by petitioner's claim, and arranged for the taking of his deposition (R. 316). The broad questions as to rules of proof which are raised in this case in reality stem from a unique feature of the proceeding of the district court, petitioner's decision not to use this deposition on the ground that he was not satisfied with certain parts of it and because "there is no burden on the libelant to bring in adverse witnesses" (R. 316). Petitioner's decision in reality assumed the new rule of proof for which he here contends. Presumably, Dudder's testimony would have constituted the best evidence. In this connection, it should be noted that petitioner's statement (Pet. 4, referring to R. 64, 124) that the deposition of Dudder had been taken as a witness for the Government and that petitioner's trial counsel "assumed" that the Government would offer it, is unsupported by the record. See fn. 4, *supra*, p. 10. The deposition was taken with both parties represented by counsel and subject to the usual admiralty stipulation that it was equally available to both parties and could be offered by either party.

Corp., 314 U. S. at 111. We submit that the well established rule, that a claimant under the Jones Act has the burden of proving fault, is here applicable; that the Government was entitled to rest in the trial court on the ground that no showing of negligence had been made out without the penalty of an unfavorable inference being drawn from its action (*Sweeney* v. *Erving*, 228 U. S. 233, 238–239); and that the court below was correct in testing petitioner's case by the usual rule.

So tested, the record fails to establish negligence. As we have already stated, petitioner specifically charged negligence on the part of a fellow servant (R. 5). The only testimony offered on the issue of negligence, that of petitioner himself, established the specific situation in which the accident occurred. He and Dudder were engaged in rounding in blocks which formed part of a guy line which had been used to steady and manipulate the portside forward cargo boom when in use over the side of the ship (R. 61–62). The guy line consisted of a 30-foot wire pennant attached to the tip of the boom and to the upper block of a four-part tackle, the lower block being shackled to a pad eye on the main or well deck (R. 62, 101). The rounding in operation had not been begun until the boom had been cradled (R. 62, 90). After the boom had been cradled, the lower or after block of the tackle had been un-

shackled from the pad eye on the well deck and had been raised to the meccano deck, a structure built above the main or well deck (R. 101–102). So raised, the lower block had been carried aft to the full span of the falls and, in petitioner's words, "* * * straightened out in line with the tip of the boom, so in taking in all the slack there would be no lines to foul up the guy line we were taking in. It would run free" (R. 101–102). Dudder, the fellow seaman charged with negligence by petitioner, was on the meccano deck holding the lower block and keeping the falls taut to prevent fouling (R. 101–102, 108). Petitioner was on the well deck hauling in and coiling the hauling end of the tackle (R. 102–105). As petitioner hauled in line, thus reducing the span of the falls, Dudder moved forward carrying the unshackled lower block, his rate of movement being determined by the rate at which petitioner hauled in the line (R. 102, 107). When petitioner last noticed Dudder, he was approximately 6 feet aft of the third 'thwartship beam on the meccano deck (R. 103). Petitioner was standing on the well deck approximately five feet forward of the third 'thwartship beam (R. 110).

Petitioner testified that he had been able to take in the rope freely at all times before the accident; that Dudder did not pull on the block so that the rope was jerked; that it would have been

impossible to pull in the rope if the falls between the blocks had not been kept in a taut position; that the lines between the blocks were lying over the second and third 'thwartship beams; and that the lines between the blocks were never lifted in the air any distance after the rounding in operation began."[18] Petitioner then testified that he was struck while bending over to coil line. His contention is that Dudder negligently dropped the block, and that the block, swinging on the lines between it and the upper block with the third 'thwartship beam acting as a fulcrum, struck him on the back of the head (R. 299; Pet. 4).

We submit that there is nothing in this testimony to show any negligence on the part of Dudder. In fact, as observed by the court below, there is no evidence as to Dudder's activities at all. The testimony shows rather that a familiar operation was being performed under petitioner's control and that, at all times prior to the accident, petitioner was hauling and coiling, and the lines

[18] This testimony is set out verbatim in the Statement, *supra*, pp. 8–10. Petitioner's testimony also shows that the taut lines between the blocks were about 4 feet inboard of a davit located about 2 or 3 feet aft of the forward or first 'thwartship beam (R. 108). The forward or upper block of the tackle involved in the rounding in operation was approximately at the first 'thwartship beam (R. 109), apparently still shackled to the pennant which ran to the tip of the cradled boom. The 'thwartship beams were approximately 12 feet apart (R. 103).

were taut and running free."[19] Since, as noted by the court below (R. 319), the force of petitioner's pull on the hauling end of the tackle would be multiplied at Dudder's end at least 3 or 4 times the force exerted, we may draw an inference from petitioner's testimony that the block was jerked from Dudder's hands. Whether such an inference need be drawn or not is immaterial. The point is that no inference as to Dudder's share in

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[19] The exact time interval between petitioner's last glance at Dudder and the falling of the block is not stated in the record. However, it seems clear from the testimony that substantially no time intervened. At the time petitioner last noticed him, Dudder was on the meccano deck six feet aft of the third 'thwartship beam, moving forward as petitioner hauled and coiled (R. 102, 103, 105, 107). Since Dudder was holding the block and facing forward, there must have been somewhat less than six feet of line between him and the third 'thwartship beam. Petitioner was standing on the well deck, apparently about five feet forward of the third 'thwartship beam. There is approximately six feet between the well deck and the meccano deck. To drop from Dudder's hands, swing in an arc on the third 'thwartship beam, and hit petitioner would require the amount of rope which ran between the third 'thwartship beam and the block held by Dudder at the time petitioner last noticed him. This accords with petitioner's testimony that the lines were taut and running freely at all times before the accident, and that he was hauling and coiling. Since Dudder was moving forward as petitioner hauled, if any substantial time had intervened between petitioner's last glance at Dudder and the falling of the block, the arc described by the falling block would not have reached petitioner. It should be noted that petitioner, who was following the usual practice at the hauling end of a rounding-in operation of hauling and coiling in almost continuous sequence, could not have hauled more than four or five feet at a time.

the operation can properly be drawn from petitioner's testimony.

Petitioner does not rely on the direct testimony offered in the district court but on other aspects of the record which, in our view, are in conflict with the direct testimony. The contention centers on a paragraph contained in the purser's accident report which states (R. 211): "Sailors were stowing the forward port side boom and the guy block was caught on a davit, one of the men cast it off and line and block fell striking this sailor on the back of the head, block causing a large cut on this man's scalp."[20] From this report, petitioner argues that the lines between the blocks (or the forward block itself) were caught on the davit mentioned in the accident report, and that accordingly the lines between the blocks were not taut (Pet. 22, 25). Not being taut, petitioner contends that he could not pull on the hauling end and that therefore a strong inference arises that he did not pull the block from Dudder's hands.

As we have mentioned above, the paragraph

[20] As stated above, fn. 10, *supra*, pp. 14–15; such a report as this is required by Marine Investigation Board Rules for the purpose of calling to the attention of the appropriate Coast Guard district the fact of a marine accident or casualty. The report contained in the record herein provides on its face for a $300 fine "* * * if injuries are not reported at once * * *" (R. 262). It should be noted that the purser did not witness the accident here involved (R. 111).

from the accident report cannot be squared with petitioner's direct testimony. The davit referred to in the accident report was located approximately three feet aft of the first or forward 'thwartship beam (R. 108). The 'thwartship beams were approximately 12 feet apart (R. 103). The davit was thus approximately 27 feet forward of Dudder and 16 feet forward of petitioner. The forward block, not the block held by Dudder, was approximately at the first 'thwartship beam (R. 109) and was apparently still shackled to the pennant which ran to the tip of the cradled boom. Petitioner testified, as we have shown above, that he was able to take in rope freely at all times before the accident. He further testified that the lines between the block held by Dudder and the forward block were about four feet inboard of the davit, and that the taut lines between the two blocks were at no time lifted in the air after the rounding in operation began (R. 107, 108). On the record, therefore, petitioner's testimony and the purser's report are in complete conflict on the precise point for which the petition argues.

Moreover, petitioner appears to argue from the purser's report, not for the purpose of establishing Dudder's negligence, but for the purpose of rebutting the strong inference raised by his own direct testimony that he jerked the block from

Dudder's hands.[21] He then argues that an "* * * unfavorable presumption * * *," should have been raised against the Government which, taken together with his own testimony, required judgment in his favor (Pet. 34). As we stated at the outset, *supra*, p. 24, the rule of proof thus urged is identical with that which the law now places on bailees in possession upon proof of damage.

Petitioner here reaches his result by invoking the doctrine of *res ipsa loquitur* in a situation which contains none of the elements which justify the use of that rule. In this connection, we believe that petitioner places improper reliance on this Court's decision in *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452. He apparently invokes only one aspect of that case, namely, the

[21] In connection with his argument on the purser's report, petitioner also refers to a statement which he signed at the time that he executed the release which was set aside by the district court (Pet. 22). This statement would seem to be of no evidentiary value in view of petitioner's specific testimony. Petitioner also refers to a colloquy between Government counsel in the district court and Judge Cavanah, contending that the colloquy constituted an admission of negligence (Pet. 35; R. 299). The colloquy, which took place after Judge Cavanah had given his decision (R. 295), was part of an effort by Government counsel to obtain specific findings (R. 298). It seems clear that the discussion merely related to the nature of the findings which were being sought from the court. Moreover, the substance of the colloquy adds nothing to the fact, which is amply clear, that the block held by Dudder struck the petitioner.

holding that the jury might justifiably have found that the injury there involved had not been caused by activities of the plaintiff's intestate. Once the jury, appropriately instructed, made such a finding in the *Jesionowski* case, the situation remaining contained all of the usual elements which permit the inference of negligence from "* * * unusual happenings growing out of conditions under a defendant's control. * * *" 329 U. S. at 454. Here, even if it be assumed that the proof supports an inference that petitioner did not, by his own conduct, cause the block to fall, the remaining situation does not contain the elements necessary to justify the application of the *res ipsa loquitur* doctrine.[22] *San Juan Light Co.* v. *Re-*

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[22] Petitioner's counsel raises for the first time in this Court a contention that the meccano deck was not a safe place to work and that the Government failed in its duty to carefully supervise the operation (Pet. 24); that the decision in this case becomes of special significance because it involves work "about a 'Maccano' deck" (Pet. 11). There has been no contention or allegation in either court below that the meccano deck had anything to do with the accident here involved and petitioner specifically testified that the accident did not result from any defective appliance (R. 115). There is absolutely nothing in the record with regard to the nature of a meccano deck beyond the bare description of the deck and the fact that the outside edge or angle iron is studded with pad eyes which make walking difficult (R. 109–110). This testimony has no relevance herein since Dudder was not walking on the angle iron but on a longitudinal beam (R. 102–103). Petitioner's reference to the meccano deck is obviously an effort to supply an essential requisite of the usual *res ipsa loquitur* rule which is here absent.

quena, 224 U. S. 89, 98–99. This case is one in which exclusive reliance is made on a specific charge of the negligence of Dudder, a fellow servant, not upon any negligence in a "condition under defendant's control." Only Dudder's negligence was alleged, and the proof adduced by petitioner was intended solely to support that allegation. Petitioner specifically negatived any contention that his injury resulted from a defective appliance. The use of the rule of *res ipsa loquitur* in the situation thus presented would, as we have said, throw the burden of proof on the defendant in all Jones Act cases which are founded on the specific negligence of a fellow servant.

This case presents no proper occasion for such an extension of the *res ipsa loquitur* rule. Petitioner's contention is not made because of any inherent characteristic of his maritime calling (cf. *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377), or because of any extraordinary circumstances surrounding the accident (*San Juan Light Co.* v. *Requena,* 224 U. S. 89, 98–99; *Sweeney* v. *Erving,* 228 U. S. 233, 240), but is made rather to fill in the gap in his proof which resulted from his decision not to prove specific negligence in the ordinary way (R. 316).[23] We

[23] Dudder was obviously the best witness to prove petitioner's case. Petitioner's counsel states that he knows but cannot reveal the details of the accident, attributing this inability to the opinion of the court below (Pet. 22). As we have

submit that the judgment of the court below should be affirmed.

II

THE COURT BELOW WAS NOT BOUND BY THE "TWO COURT" RULE OR BY THE "PLAIN AND MANIFEST ERROR" RULE

Petitioner contends that the court below was bound by the decision of two district court judges on the issue of negligence (Pet. 32–33). He argues that Judge Hollzer, who heard the case but died before it was decided, had reached the same conclusion as that reached by Judge Cavanah to whom the case was submitted for decision on the written transcript. In support of this contention, petitioner refers to the signature of Judge Hollzer on the pre-trial stipulation, and discussions on the admissibility of the purser's report. We see no substance to this contention and do not believe that it requires discussion. The pre-trial stipulation expressly reserved the question of negligence. The observations of the judge on the purser's report were mere comments on its admissibility.

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shown above (fn. 17, *supra*, p. 25), counsel for both parties participated in taking Dudder's deposition and stipulated that it was available to both parties and could be offered by either party. It should be noted that petitioner's assertion, that the Government had knowledge with regard to the circumstances of the accident and that he did not, is supported only by record references to the purser's accident report (Pet. 23, 34), which named Dudder as the witness to the accident (R. 264).

Petitioner also contends (Pet. 18, 33–34) that the court below erred in holding that "* * * the findings of the trial court do not come * * * encased in their usual armor * * *" in view of Judge Hollzer's death and because the appeal was in admiralty (R. 317).. We submit that this contention is without merit.[24] An appeal in admiralty is traditionally stated to be a trial *de novo*. *The Ariadne*, 13 Wall. 475; *Reid* v. *Am. Exp. Co.*, 241 U. S. 544, 548. Variations have been drafted on this rule by decision and by the admiralty rules promulgated by this Court. *Matton Oil Transfer Corporation* v. *The Dynamic*, 123 F. 2d 999, 1,000 (C. C. A. 2); *The Marguerite*, 140 F. 2d 491, 495 (C. C. A. 7); *Matson Nav. Co.* v. *Pope & Talbot*, 149 F. 2d 295, 298 (C. C. A. 9), certiorari denied, 326 U. S. 737; *The Ernest H. Meyer*, 84 F. 2d 496 (C. C. A. 9), certiorari denied, 299 U. S. 600.[25] These variations are based on the

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[24] For the purpose of this point, we assume that Judge Cavanah made findings. In fact, his only finding is in the language of petitioner's allegation of negligence and states the conclusion that petitioner "* * * was struck by a * * * block, which was negligently and carelessly dropped by a fellow seaman * * *" (R. 5, 43).

[25] Admiralty rule 46½ (281 U. S. 773), requiring the trial court to make findings of fact and conclusions of law, as in ordinary civil action, requires that due weight be given "to the findings of fact made by the trial judge, who has had the opportunity to see the witnesses as they testified and thus determine the truth of disputed testimony in ways not open merely on inspection of a printed appellate record." *Matton Oil Transfer Corporation* v. *The Dynamic*, 123 F. 2d at 1,000.

assumption that all or a substantial portion of the evidence was heard in open court; the findings of a trial judge who thus saw and heard the witnesses are to be given considerable respect. However, in this case, Judge Cavanah neither saw nor heard the witnesses and Judge Hollzer made no findings. In these circumstances, it is well settled that the court below was free to review the record and to draw its own conclusions. *Alioto* v. *Imahashi,* 115 F. 2d 324 (C. C. A. 9); *The Ernest H. Meyer, supra; New Orleans Coal & Bisso Towboat Co.* v. *United States,* 86 F. 2d 53, 55–65 (C. C. A. 5). Moreover, we consider it doubtful that the point is open to petitioner in this Court. As pointed out above, fn. 13, *supra,* p. 17, petitioner urged in the court below that it was too well settled to require citation of authority that an appeal in admiralty was a trial *de novo.*

III

PETITIONER'S REJECTION OF MARINE HOSPITAL TREATMENT BARS HIM FROM RECOVERING MAINTENANCE AND CURE

Petitioner contends that he is entitled to an award to cover the cost of maintenance and cure in addition to the damages allowed by the district court. Entirely apart from the questions heretofore argued, it is clear that the courts below were correct in denying him this additional recovery.

The obligation of the ship and its operator is to furnish the seaman maintenance and cure, not

to reimburse him for care and cure of his own selection.

It is settled law that the ship and its operator fully discharge the duty to furnish maintenance and cure by offering the seaman treatment in a Marine Hospital, and that a seaman by refusing to accept treatment therein waives all further rights against his employer. *The Bouker No. 2,* 241 Fed. 831, 835 (C. C. A. 2), certiorari denied, 245 U. S. 647; *The Santa Barbara,* 263 Fed. 369, 371 (C. C. A. 2); *Cummins* v. *Wry,* 10 F. 2d 408 (C. C. A. 3); *Marshall* v. *International Mercantile Marine Co.,* 39 F. 2d 551 (C. C. A. 2); *The Saguache,* 112 F. 2d 482 (C. C. A. 2); *Van Camp Sea Food Co.* v. *Nordyke,* 140 F. 2d 902 (C. C. A. 9); *Bailey* v. *City of New York,* 153 F. 2d 427 (C. C. A. 2); *United States* v. *Loyola,* 161 F. 2d 126 (C. C. A. 9); *Stewart* v. *United States,* 25 F. 2d 869 (E. D. La.). This rule was implicitly approved in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, where this Court said [p. 531]:

> * * * Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service. *The Bouker No. 2* [241 Fed. 831], 835; *Marshall* v. *International Mercantile Marine Co.* [39 F. 2d 551], 553, and cases cited.

Petitioner apparently concedes the validity of this rule, for as to this point he contends that because the Public Health Service officials "acquiesced."[26] in petitioner's desire to go to his old home in Texas for a rest there was no such refusal of Public Health Service hospitalization as to discharge respondent from liability (Pet. 27). The court below rejected this contention, however, and found that petitioner had refused the proffered hospitalization (R. 329).

This finding by the court below that petitioner had refused hospitalization is fully sustained by the record. After remaining in the Pacific Palisades Seamen's Rest Center for the maximum time permitted by its rules, petitioner was discharged with a diagnosis of post concussion syndrome, the medical report of the Rest Center recommending continued treatment at the U. S. Public Health Service in San Diego (R. 118, 250). During the time between his discharge from the Rest Center and his reporting to the

[26] If petitioner is taken literally in his use of the term "acquiesce" then his argument involves a *non sequitur*, since "acquiesce" means "to accept or comply tacitly or passively, without implying assent or agreement; to accept as inevitable or indisputable." Webster, *New International Dictionary* (2d ed. 1936). Respondent contends that, as the Public Health Service doctors could not require petitioner to follow their advice, they necessarily acquiesced when he declined to go to the hospital. It is assumed that petitioner uses the term "acquiesce" intending it to mean "agree," and respondent's argument will be based on this assumption.

Public Health Service at San Diego, petitioner spent several days in bed at home (R. 119), and when he did report to the Public Health Service the doctors there advised further hospitalization in the Marine Hospital at San Francisco (R. 251, 119–120). In spite of the persistence of the symptoms of which he had been complaining, and the fact that even after he had left the Rest Center these symptoms had compelled him to take to his bed for a time, petitioner declined the hospitalization, stating that he "would rather not go" (R. 120). Apparently it was at this time that petitioner stated his intention to make a trip to a ranch in Texas which was owned by the family, and was told by the Public Health Service officials in San Diego to visit the office of that Service in Galveston (R. 119, 122). Since the Public Health Service officials could not compel petitioner to enter a hospital, there is clearly no basis for assuming that they agreed to his plan to take a rest on the Texas ranch and receive out-patient service from the Galveston office as an alternative treatment to the hospitalization which they advised. Even in petitioner's testimony there is nothing to indicate that they accepted and agreed to this plan as a substitute for the treatment proposed by them, nor is there any indication that petitioner's refusal to go to the hospital was based on anything other than his desire to treat

himself as he saw fit (R. 119–122).[27] In any event, whatever the Public Health Service officials at San Diego may have said, the fact remains that when petitioner went to the Public Health Service at Galveston he was advised to enter the Marine Hospital there, and upon his refusal to do so he was advised to enter the near-by Public Health Service Rest Center at Kittiwake, which he also refused to do (R. 254). Petitioner does not attempt to reconcile this positive evidence of his refusal of hospitalization with his theory that the Public Health Service doctors accepted the treatment which he prescribed for himself. We submit that such a reconciliation is impossible, and that the court below was clearly justified in finding, from these facts, that petitioner had voluntarily rejected hospitalization,

[27] Cf. *Targda* v. *United States*, 162 F. 2d 615 (C. C. A. 9), which holds that a seaman who left the Marine Hospital without the consent and against the advice of the attending physicians could not recover for maintenance and cure. Both *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840 (C. C. A. 2), and *Rey* v. *Colonial Navigation Co.*, 116 F. 2d 580 (C. C. A. 2), relied on by petitioner (Pet. 27) are distinguishable on their facts, since it is clear in each case that the seaman left the Marine Hospital with the approval of the doctors and not against their orders and advice.

Even if petitioner had rejected treatment at the Marine Hospital because he preferred to be treated by a private physician, he could not recover the cost of such treatment. *The Santa Barbara*, 263 Fed. 369, 371 (C. C. A. 2); *United States* v. *Loyola*, 161 F. 2d 126 (C. C. A. 9). *A fortiori*, petitioner is barred from recovering here, since he took the rest cure on the Texas ranch which he himself prescribed (R. 121) in preference to the proffered hospital care.

which rejection, in and of itself, defeats his claim for maintenance and cure.

Moreover, petitioner's claim for maintenance and cure was rejected by both courts below on the ground that he had incurred no expense or liability in connection therewith. There is ample authority to support this disposition of his claim. *Field* v. *Waterman S. S. Corp.*, 104 F. 2d 849 (C. C. A. 5); *Carroll* v. *Moran T. & T. Co.*, 88 F. 2d 144 (C. C. A. 9); *Cummins* v. *Wry*, 10 F. 2d 408 (C. C. A. 3); *Robinson* v. *Swayne & Hoyt*, 33 F. Supp. 93 (S. D. Cal.); cf. *Calmer S. S. Corp.* v. *Taylor*, 303 U. S. 525, 531; *Bailey* v. *City of New York*, 153 F. 2d 427 (C. C. A. 2) and cases there cited.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is correct and should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 138.—October Term, 1947.

Robert C. Johnson, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 9, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari which we granted because of the seeming misapplication by the court below of *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452.

Petitioner was a seaman on S. S. Mission Soledad, a steam tanker owned and operated by the United States. He was on the main deck rounding in two blocks, an operation which followed the cradling of the boom. One block was attached to the outer end of the boom by a wire rope. The other block was being held by a shipmate, one Dudder, who stood above petitioner on the meccano deck, a structure of beams which had been erected on the main deck. Petitioner was taking in the slack by pulling on the free end of the rope which ran through the two blocks. As he pulled on the rope the two blocks were brought together. When that was done Dudder had to walk forward with the block he held at a rate of speed controlled by petitioner. The operation went forward smoothly. Petitioner would pull on the rope, Dudder would walk forward, and then petitioner would stop to coil the accumulated free line. Petitioner and Dudder had worked harmoniously, neither one jerking on the line nor interfering with the other's function. There was no fouling of the lines; the rope was taut and ran free.

(see 41 Stat. 525, 46 U.S.C. § 742)

We have only a partial account of how the injury to petitioner occurred. Dudder was not called. The only testimony we have is from petitioner and his version of the episode is uncontradicted. The block which it was Dudder's duty to hold (and which weighed 25 or 30 pounds) was permitted to fall; it hit petitioner on the head and caused the injury for which this libel *in personam* was filed under the Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. § 688. Dudder, as we have said, was standing above petitioner. It is not certain why the block fell. Petitioner was hit without warning. When hit, he was bending over coiling the line on the deck.

The rule of *res ipsa loquitur* applied in *Jesionowski* v. *Boston & Maine R. Co.*, *supra*, means that "the facts of the occurrence warrant the inference of negligence, not that they compel such an inference." *Sweeney* v. *Erving*, 228 U. S. 233, 240. We need not determine what the result would be if it were shown that petitioner was pulling on the rope when the accident happened. For the uncontradicted evidence is that he was not pulling on the rope but was bending over coiling it on the deck. A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. But where, as here, the injured person is not implicated (*Jesionowski* v. *Boston & Maine R. Co.*, *supra*), the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder alone remains implicated, since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible.

The Jones Act makes applicable to these suits the standard of liability of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51. Thus the shipowner becomes liable for injuries to a sea-

man resulting in whole or in part from the negligence of another employee. See *De Zon* v. *American President Lines*, 318 U. S. 660, 665. And there is no reason in logic or experience why *res ipsa loquitur* is not applicable to acts of a fellow servant. See *Lejeune* v. *General Petroleum Corp.*, 128 Cal. App. 404; *Johnson* v. *Metropolitan Street R. Co.*, 104 Mo. App. 588, 592–593. True, the doctrine finds most frequent application in cases of injuries arising from instruments or properties under the employer's exclusive control. *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89; *Jesionowski* v. *Boston & Maine R. Co.*, *supra*; *Lukon* v. *Pennsylvania R. Co.*, 131 F. 2d 327; *Sweeting* v. *Pennsylvania R. Co.*, 142 F. 2d 611. Inherent, however, in the negligence inferred in that type of case is an act or failure to act by an individual. While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant. See *Terminal R. Assn.* v. *Staengel*, 122 F. 2d 271.

No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2d 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused a lapse of memory which antedated the actual injury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped

the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act.

Petitioner presses here his claim for maintenance and cure which was rejected by both courts below. He was hospitalized by respondent for a number of weeks following the accident. He was then found unfit for sea duty and doctors of the Public Health Service recommended that he enter various government hospitals. He refused and went instead to live on the ranch of his parents. We need not decide whether an agreement between petitioner and the government doctors for out-patient treatment and rest at his home might be inferred. Cf. *Rey* v. *Colonial Navigation Co.*, 116 F. 2d 580; *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840. For there is ample evidence to support the findings of the two lower courts that petitioner had incurred no expense or liability for his care and support at the home of his parents. See *Field* v. *Waterman S. S. Corp.*, 104 F. 2d 849. On that issue we affirm the Circuit Court of Appeals. On the issue of negligence we reverse it.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 138.—October Term, 1947.

Robert C. Johnson, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 9, 1948.]

Mr. Justice Frankfurter dissenting in part.

What is this case? It is a suit by the petitioner, a seaman, for an injury sustained while working on a vessel owned and operated by the United States. Under existing law the United States is liable only if it failed in its duty of exercising reasonable care in safeguarding its employees—the United States is liable, that is, only if it was negligent. And it is up to the plaintiff to prove such negligence.

What is the plaintiff's claim here? It is that while the petitioner and a fellow seaman named Dudder were working together in an operation known as "rounding in" blocks to bring two blocks of a block and tackle together, somehow or other a block fell and struck the petitioner, who was operating on a deck below Dudder, on the head. The claim is that the block which hit petitioner was negligently released by Dudder and that the United States is responsible for Dudder's negligence. (The "fellow servant rule" is not a defense under the Jones Act which authorizes this suit. 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. § 688.) There were no witnesses to this happening besides Dudder and Johnson. The only sources of knowledge for ascertaining what actually happened—whether fault lay with Dudder or Johnson or with nobody, as the law determines fault—were the ac-

counts which Dudder and Johnson might furnish and such inferences as human experience could reasonably draw from the occurrence itself.

What evidence does the record disclose? Of the two available witnesses only one testified. That was the petitioner. It is accurate to state, therefore, that his version of what immediately preceded the injury was uncontradicted. But it is no less true that he was unable to furnish any evidence bearing on the cause of the happening.[1] His testimony has not established that it was the carelessness of Dudder that caused the block to fall out of Dudder's hand rather than a careless jerk of the rope by himself which caused such release. Dudder was available as a witness but he was not called. The United States in fact had Dudder's deposition taken before the trial, and it was placed at Johnson's disposal. Neither party, for reasons of its own, called Dudder as a witness or introduced his deposition.

What conclusions are to be drawn from the facts as they were developed at the trial? It is not the business of this Court to conduct the trial of a case or, even where a case is technically open here on the facts, to sit in independent judgment on the facts. If a case like this is to be allowed to come here at all, we sit in judgment on the proceedings in their entirety. This is a proceeding in Admiralty tried by a judge and not a jury. The trial judge, who heard the testimony and who was in the best possible position to weigh what he heard and

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[1] Petitioner testified:

"Q. Now, when you were standing there just before the accident, in the last thing you knew before the accident happened, what were you doing?

"A. I was coiling the line on the well deck or the Maccano deck.

"Q. Standing up or bending over?

"A. I was bending over.

"Q. Then what happened?

"A. That is all I remember."

saw, died before he gave his view of the testimony. By agreement, the cause was then submitted for judgment by another district judge on the basis of the cold record. He decided for the petitioner. The United States then appealed to the Circuit Court of Appeals for the Ninth Circuit. Three other judges on the basis of the same dead record reversed the district judge. 160 F. 2d 789. The result is that on the issue whether the United States is liable because one of its employees was negligent—that is, whether Dudder in fact carelessly let the block slip out of his hands—one judge said yes, and three judges said no.

What is the applicable law? My brethren say the circumstances speak for themselves in establishing Dudder's negligence. This means that the three judges below should have found, and this Court must now find, that the record proves that the injury can only be explained by Dudder's carelessness—for the petitioner, it deserves repeating, must have established Dudder's carelessness in order to hold the United States liable. I agree that if the rule of *res ipsa loquitur* determines this case, the scope of that rule is found in *Sweeney* v. *Erving*, 228 U. S. 233, reaffirmed last term as a "decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur*." *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452, 457. But these two sentences are a vital part of the *Sweeney* case: "*Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff." 228 U. S. at 240. Therefore, even if the rule of *res ipsa loquitur* is here relevant, it should not by itself sustain a finding for the petitioner, "for the reason that in cases where it does apply, it has not the effect of shifting the burden of proof." 228 U. S. at 238. Since we cannot tell from the record how the

injury to the petitioner occurred—it certainly was not established why the block fell—I cannot escape the conclusion that petitioner failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to the respondent's negligence. Cf. the *Jesionowski* case, *supra* at p. 454.

But I do not believe that *res ipsa loquitur* is applicable here. It is, after all, a "rule of necessity to be invoked only when necessary evidence is absent and not readily available." See Cooley, Torts (4th ed.) § 480. Here the evidence as to the cause of petitioner's injuries was admittedly available, and it would seem to follow that since what actually happened could have been adjudicated, it should have been adjudicated. Therefore, I would affirm the judgment of the court below but modify its mandate so that there may be a new trial on this issue and an adjudication based upon an adequate determination.

While a court room is not a laboratory for the scientific pursuit of truth, a trial judge is surely not confined to an account, obviously fragmentary, of the circumstances of a happening, here the meagre testimony of Johnson, when he has at his command the means of exploring them fully, or at least more fully, before passing legal judgment. A trial is not a game of blind man's buff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony.

Federal judges are not referees at prize-fights but functionaries of justice. See *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95; *Quercia* v. *United States*, 289 U. S. 466, 469. As such they have a duty of initiative to see that the issues are determined within the scope of the pleadings, not left to counsel's chosen argument. See *New York Central R. Co.* v. *Johnson*, 279 U. S. 310, 318. Just as a Federal judge may bring to his aid an auditor,

without consent of the parties, to examine books and papers, hear testimony, clarify the issues, and submit a report, in order to "render possible an intelligent consideration of the case by court and jury," *Ex parte Peterson*, 253 U. S. 300, 306, and in so doing has the power to tax the expense as costs "necessary to the true understanding of the cause on both sides," *Whipple* v. *Cumberland Cotton Co.*, 3 Story 84, 86, he has the power to call and examine witnesses to elicit the truth. *See Glasser* v. *United States*, 315 U. S. 60, 82. He surely has the duty to do so before resorting to guesswork in establishing liability for fault.

Dudder's account of what happened surely could supplement Johnson's as a basis for recreating the events which led to Johnson's injury. Neither party saw fit to use his available testimony. Instead of entering judgment for the party who had the burden of proof and did not meet it, the trial judge should at least have called Dudder as the court's witness. As Judge Sibley observed in a case where witnesses who knew what actually happened had not been called to testify: "We think that the interests of justice would be served by a new and more orderly trial, which can easily be managed . . . . Williams and Batson [the witnesses] certainly know the truth of the things in dispute. If neither party will risk calling a witness who knows important facts, it is in the power of the court to call and examine such a witness, in the interest of truth and justice, allowing both parties the right of cross-examination and impeachment." *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.*, 143 F. 2d 826, 828–9.

Three courts and thirteen judges have now passed on this case when in good reason a situation like this ought never to get into court at all. The crux of the difficulty is that an industrial injury such as the petitioner suffered is as to interstate railroad employees and seamen still determined by the archaic law of negligence instead of

by a just system of workmen's compensation. Occurrences like the one now in controversy are inherent in industrial employment and to make liability depend on a finding of "negligence" is to pursue unreality. England abolished negligence as the basis of liability fifty years ago. The States, long laggards in making law conform to the actualities of industry, have now, with only a single exception, supplanted the outmoded liability for fault by a rational system of workmen's compensation laws, and Congress has enacted compensation laws for the District of Columbia, federal employees, and for longshoremen and harbor workers. "It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production." Holmes, J., in *Arizona Employers' Liability Cases*, 250 U. S. 400, 433. But so long as Congress sees fit to have liability for injuries by railroad employees and seamen based solely on proof of fault, it is not for this Court to torture and twist the law of negligence so as to make it in result a law not of liability for fault but a law of liability for injuries.

One cannot be unmindful that "the radiating potencies of a decision may go beyond the actual holding." *Hawks v. Hamill*, 288 U. S. 52, 58. Lower courts read the opinions of this Court with a not unnatural alertness to catch intimations beyond the precise *ratio decidendi*. A decision like this exerts an influence, however unwittingly, well calculated to lead lower court judges to avoid reversals by deciding compassionately for the plaintiff in these negligence cases confident that such decisions are not likely to be reviewed here.

I would have the cause remanded to the District Court for further proceedings in conformity with this opinion.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON join in this dissent.